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THE DUTY OF NEUTRALS TO PROTEST

By JAMES BROWN SCOTT

President of the American Institute of International Law

IT is admitted to be the right and the duty of a neutral nation to protest if the action of a belligerent affects injuriously the persons or the property of that neutral. The books are full of protests in such cases, and a large part of the correspondence of neutral nations since the outbreak of the great war in August, 1914, consists of the protests of neutrals to belligerents. It is not so generally recognized that a neutral nation has a right to protest, although its citizens, or their property, may not have been directly injured by belligerent action, or that it be the right and the duty for a neutral nation to protest against a violation of neutral right, even although neither the lives of its citizens nor their property are directly affected. The reason is that the violation of the right of one neutral is a violation of the right of all neutrals; for if a belligerent can violate at its pleasure a rule of law which today affects nations A, B, or C, it may tomorrow violate the same rule of law affecting the interests of nations X, Y, and Z. Indeed it is not the injury to the person or the injury to the property which matters. It is the withdrawal of the protection of the rule of law, upon which both life and property depend. Withdraw the law, and the person and property of the neutral are at the mercy of the belligerent.

It is correct to say that a foreign nation would not be justified in protesting a rule of municipal law until either its citizens or subjects or their property were injured. It is not to be presumed that a municipal law has been passed which will be interpreted as contrary to international law, and it is a canon of construction that a municipal law will be presumed to be consistent with international law unless such a construction is impossible. Thus, in the case of the *Charming Betsy* (2 Cranch, 64, 118), decided by the Supreme Court of the United States in 1818, Chief Justice Marshall said:

"It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country."

The presumption is either that the law is not inconsistent with the rule of international law, or that it will not be applied to foreign persons or interests in such a way as to violate the rule of international law. Even in these cases it would be proper to call attention to the probable consequences of the statute.

But the nation passing the statute is sovereign within its territory, and it has the right to exercise its sovereignty in such a way as to affect all persons, alien or native, within its jurisdiction, and all property within its jurisdiction. The case is entirely different in international law. No nation has a right to make international law; no nation has a right to give to its municipal statute international effect; no nation has a right to extend its statutes in such manner as to interfere with the

rights of other nations. This arises from the independence and equality of nations. As Sir William Scott, later Lord Stowell, put it in 1817, in deciding the case of *Le Louis* (2 Dodson, 210, 243):

"Two principles of public law are generally recognized as fundamental. One is the perfect equality and entire independence of all distinct states. Relative magnitude creates no distinction of additional right to the more powerful neighbor; and any advantage seized upon that ground is mere usurpation. This is the great foundation of public law, which it mainly concerns the peace of mankind, both in their public and private capacities, to preserve inviolate. The second is, that all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all states meet upon a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another."

The language of Chief Justice Marshall, in the case of the *Antelope* (10 Wheaton, 62, 122), decided in 1825, is no less positive, and cannot be too often quoted:

"No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which is vested in all, by the consent of all, can be divested only by consent; and this [slave] trade, in which all have participated, must remain lawful to those who cannot be induced to relinquish it. As no nation can prescribe a rule for others, none can make a law of nations; and this traffic remains lawful to those whose governments have not forbidden it."

Now, if international law is largely a thing of usage, of usage hardened into custom, nations cannot afford to allow one of their number to embark upon a course which, if continued, and if submitted to by them, will result in a precedent binding their conduct, if not their conscience. Lest usage shall harden into custom and silence seem to give consent, it is the right and it is the duty of neutral nations to state firmly and positively that they will not allow a violation of international right to be an exception to the rule, which it will be if, without protest, they permit the belligerent to violate the rule of law.

Again, if no one nation can make a law of nations, and if a nation is only bound by what it agrees to, it follows that a rule to be regarded as forming part of the law of nations must be made by all or consented to by all. Differing from municipal law, which is made by one nation, international law is made by the many, or by all in common. The very moment, therefore, when any nation, however powerful, arrogates to itself the right to abrogate a rule of international law—for violation of a right of neutrals without the consent of neutrals is in effect a claim to abrogate the rule—it is the right of neutrals to interpose an objection; and if the view stated above be correct, it is the duty of neutrals to do so, whether or not they seem to be directly affected in the persons of their subjects or citizens, or of their property. If international law were as municipal law, the rule of

* From Dr. Scott's presidential address before the American Institute of International Law, Havana, Cuba, January 22, 1917.

one country, this could not be so. But as it is the rule of all countries, the violation of that rule is in effect the violation of it for all neutrals, because it is the law of all neutrals, and not merely the right of the particular country.

A case in point will make this clear; and in order that no criticism may seem to be made of foreign countries, an American illustration will be chosen. On November 8, 1861, the United States man-of-war *San Jacinto*, under the command of Captain Charles Wilkes, stopped the steamer *Trent*, took off two civil passengers, Messrs. Mason and Slidell, commissioners from the Confederate States of America to Europe, and thereafter allowed the vessel to continue its passage. The *Trent* was a British mail packet, therefore a neutral vessel, on its way from Havana to St. Thomas. Under international law then existing and as it now stands, the United States did not have the right to remove Mason and Slidell, although Secretary of State Seward claimed that it would have been proper for Captain Wilkes to capture the vessel and to take it into an American port, in order to have it condemned for carrying the Confederate commissioners, who were apparently regarded by the American authorities as in the nature of contraband. Great Britain protested against the removal of civil passengers from a British and neutral vessel, and it was clearly both the right and the duty of Great Britain to protest. The United States yielded, and returned Mason and Slidell to British custody.

But there was more to the incident than this, otherwise it would not be cited in this connection. France, Prussia, and Austria formally protested against the action of the United States in removing Mason and Slidell from the *Trent*, and Russia called the matter informally to the attention of the United States. On December 3, 1861, the French Imperial Minister of Foreign Affairs, M. Thouvenel, instructed the French Minister at Washington to wait upon Secretary of State Seward, to read to him the instruction and to leave a copy with him should he desire it. The Minister of Foreign Affairs laid the foundation for his protest in the following passage:

"The wish to contribute to prevent a conflict, imminent perhaps between two powers towards which it is animated by sentiments equally friendly, and duty to maintain certain principles essential to the security of neutrals with the effect of protecting the rights of its own flag from injury, have convinced it [the government of the Emperor], after mature reflection, that it cannot under these circumstances remain altogether silent." (Bernard's *Neutrality of Great Britain During the American Civil War*, 1870, pages 196-200.)

After this expression of friendly regard, Mr. Thouvenel discussed the merits of the incident, and after expressing the views of his government, thus continues:

"Not wishing to enter into a more thorough discussion of the question raised by the capture of MM. Mason and Slidell, I have said enough about it, I believe, to establish that the Cabinet at Washington would not be able, without infringing upon the principles for which all neutral powers are equally interested in assuring respect or without contradicting its own conduct up to this time, to give its approval to the proceedings of the commander of the *San Jacinto*."

One more protest may be quoted as of more than passing interest. On December 25, 1861, the Prussian Minister of Foreign Affairs, Count von Bernstorff, a name familiar to the American people at the present time because of the fact that the German Ambassador to the United States bears the honored name of this minister, and is his son, instructed the Prussian Minister to the United States, Baron von Gerholt, to call upon Secretary Seward to read him the contents of his instruction, and to leave a copy of it with him should the American Secretary of State desire it. This particular instruction of the Prussian Minister of Foreign Affairs dealt with the *Trent* affair, courteously but firmly stating the rights of neutrals, and protesting against their violation in this instance. Thus he said:

"The maritime operations undertaken by President Lincoln against the Southern seceding States could not, from their very commencement, but fill the King's government with apprehensions lest they should result in possible prejudice to the legitimate interests of neutral Powers.

"These apprehensions have unfortunately proved fully justified by the forcible seizure on board the neutral mail packet, the *Trent*, and the abduction therefrom of Messrs. Mason and Slidell by the commander of the United States man-of-war, the *San Jacinto*.

"This occurrence, as you can well imagine, has produced in England and throughout Europe the most profound sensation, and thrown not cabinets only, but also public opinion, into a state of the most excited expectation. For, although at present it is England only which is immediately concerned in the matter, yet on the other hand it is one of the most important and universally recognized rights of the neutral flag which has been called into question."

It will be observed that Count von Bernstorff does not speak in this passage of Prussian rights as such. He takes the broader ground that a violation of the neutral right of any country is a violation of the neutral rights of all countries, and therefore of Prussia's. He recognizes that the claim to violate neutral rights in the case of Great Britain was in effect the claim to violate the neutral rights of every other state belonging to the society of nations, and because of that fact, the incident had, to quote Count von Bernstorff's explanation, "produced in England and throughout Europe the most profound sensation, and thrown not cabinets only, but also public opinion, into a state of the most excited expectation."

But strong as is this note, just as are its views, and admirable as is its temper, the Prussian government, as will be seen in a further quotation from the instruction, did not wait for an inquiry or investigation to show whether Captain Wilkes' action was by the direction of his government or whether it met with its approval. In Count von Bernstorff's opinion, in either case it made no difference in effect whether Wilkes was acting under instructions, or whether he acted upon his own initiative. The world was confronted with the violation of neutral rights, and therefore a protest was justified and requisite. Thus:

"In the absence of any reliable information we were in doubt as to whether the captain of the *San Jacinto*, in the course taken by him, had been acting under orders

from his government or not. Even now we prefer to assume that the latter was the case. Should the former supposition, however, turn out to be the correct one, we should consider ourselves under the necessity of attributing greater importance to the occurrence, and to our great regret we should find ourselves constrained to see in it not an isolated fact, but a public menace offered to the existing rights of all neutrals."

As Chief Justice Waite has said in the *Arjona* case (120 U. S., 479, 487), decided by the Supreme Court of the United States in 1886:

"International obligations are of necessity reciprocal in their nature. The right, if it exists at all, is given by the law of nations, and what is law for one is, under the same circumstances, law for the other."

In the society of nations as at present organized, there is no central authority and there is nobody authorized to speak and to act for the society as a whole. The maintenance of international law depends upon the enlightened judgment and good faith of the different nations. Each acts for itself, but in so doing it acts for all, because the right of one is the right of all, and the duty to one, unless it be based upon a special treaty, is the duty of all.

If we are not our brother's keeper, we are, or at least we should be, conservators of the law. It is the right, and indeed it is the duty, of neutrals, not of any particular neutral, to protest against the violation of neutral rights.

"Inasmuch as ye have done it unto one of the least of these, my brethren, ye have done it unto Me."

FOR A CONFERENCE OF NEUTRAL NATIONS

An Open Letter to President Wilson,

February 7, 1917

By HENRI LA FONTAINE

President of the International Peace Bureau

AS PRESIDENT of the International Peace Bureau, and in the name of the peacemakers of the world, "the forward-looking men and women everywhere, of every modern nation, of every enlightened community," to whom you alluded in your momentous address to the Senate, I deem it my duty and a most welcome privilege to express to you their high feelings of gratitude and elation.

For the first time in history the ruler of a powerful nation dares to proclaim the fundamental bases, the acceptance of which these men and women have for long years advocated as the necessary condition of a lasting peace. For those who on these shores a century ago started the Peace Movement which culminated in the calling of the Peace Conferences of 1899 and 1907, as well as for those who have followed in their steps and have never despaired, your bold initiative would have been and is their highest reward. With unabated perseverance, they have appealed to churches, schools, universities, and parliaments; but they have not been able to reach the masses. Rulers and diplomats have not realized the need of the policies and the principles expounded by these forerunners, who have been branded too often as dreamers and prophets.

You have spoken; the world listens, and your words will reach the hearts and brains of all men. You have spoken, as you have said, not only for the people of the United States, but for the friends of humanity, for the worshipers of freedom, and for the silent mass of mankind confined in the trenches, as well as in the homes, of Europe and prohibited, even in the most liberal countries on earth, to speak, write, or yet whisper their contempt for war and their will to rebuild the world as a commonwealth of equal nations and of brotherlike men. The peoples, they claim, have the inalienable and imprescriptible right to dispose freely of themselves; and now you rise and proclaim in striking words "that every people should be left free to determine its policy, its own way of development, unhindered, unthreatened, unafraid—the little along with the great and powerful." You have spoken of Poland as you might have spoken of Belgium, Serbia, Bohemia, Finland, Armenia, Persia, Hanover, Saxony, Egypt, Schleswig-Holstein, Alsace-Lorraine, Ireland, Lithuania, Trentino, Croatia, Transylvania, or of any dependent and oppressed nationality for the liberation of which the peacemakers have expressed their perennial sympathies.

"The equality of nations upon which peace must be founded must be an equality of rights," but among those rights it may be affirmed that the most vital is the right to be free nationally and internationally; like the peacemakers, you have claimed that "no peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their just power from the consent of the governed." More than a century ago Immanuel Kant expressed this idea in his often-quoted sentence: "The civil constitution of each State shall be republican"; and he added, and the peacemakers have repeated it again and again, that "a State is not a property as may be the ground on which its people are settled; it is a society of human beings over whom no one but itself has the right to rule and to dispose." With you the peacemakers agree "that no right anywhere exists to hand peoples about from sovereignty to sovereignty, as if they were property"; there exists no right of conquest; wherever peoples are intermingled "inviolable security of life, of worship, of industrial and social development," is to be guaranteed them.

With you again the peacemakers affirm that "the free, constant, unthreatened intercourse of nations is an essential part of the process of peace and of development." They further urge not only the freedom of the seas, which already in times of peace was acknowledged and granted, but also the freedom of trade and, as Vattel says, "the right of way and passage," that which Kant called "the right of hospitality." They go even further and claim, under international guarantees, the right of settlement abroad. As for the use of waterways, they are of opinion that not alone an "outlet to the great highways of the seas should be assured" to every people, great or small; but that rivers, straits, and canals should be open freely to vessels of every nationality. The great highways on land should likewise be open to the citizens and the products of all nations without hindrance or discrimination.

Like you, the peacemakers have insisted there should be no more organized rivalries, no more unattainable balance of power; but only one world alliance, a community or concert of power; as you have said in such